No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLEES

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QUESTION PRESENTED

Whether the three-judge district court correctly held that the "one-person, one-vote" principle under the Equal Protection Clause allows States to use total population, and does not require States to use voter population, when apportioning state legislative districts.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities v

Introduction 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 3

Summary of Argument 8

Argument 10

I. Plaintiffs' Claim Is an Equal Protection Claim of Invidious Vote Dilution. 10

A. A One-Person, One-Vote Claim Is a Claim of Invidious Vote Dilution 10

B. A State Does Not Commit Unconstitutional Vote Dilution Unless It Acts Irrationally or for an Impermissible Purpose. 16

II. A Good-Faith Effort to Equalize Total, Citizen, or Voting-Eligible Population Satisfies the Equal Protection Clause. 18

A. *Burns v. Richardson* Held that the Equal Protection Clause Does Not Require States to Reapportion Based on a Particular Measure of Population. 18

B. A State Does Not Commit Invidious Vote Dilution When It Makes a Good-Faith Effort to Equalize Total, Citizen, or Voting-Eligible Population. 24

1. Substantial population equality generally satisfies the Equal Protection Clause. 25

2. The apportionment goal of population equality is not in tension with the goal of voting equality. 34

3. *Baker* and *Reynolds* do not require the States to rely on voter population. 37

4. The text and history of the Fourteenth Amendment do not support plaintiffs' interpretation of the Equal Protection Clause. ... 39

C. States Are Not Required to Reapportion Based on Total Population. 43

III. Texas Did Not Violate the Equal Protection Clause by Apportioning Senate Seats Based on Total Population 49

A. Texas Did Not Engage in Invidious Vote Dilution. 49

B. Census Data Provide a Reliable Measure of Population. 50

C. Plaintiffs Propose Unworkable Apportionment Methods. 54

Conclusion 57

Appendix — Apportionment Base Provided by State Constitutions and Statutes 1a

TABLE OF AUTHORITIES

Page

Cases

Abrams v. Johnson,
521 U.S. 74 (1997) 32

Baker v. Carr,
369 U.S. 186 (1962) ..... *passim*

Bd. of Estimate v. Morris,
489 U.S. 688 (1989) 34, 36, 37

Brown v. Thomson,
462 U.S. 835 (1983) ..... *passim*

Burns v. Richardson,
384 U.S. 73 (1966) ..... *passim*

Carrington v. Rash,
380 U.S. 89 (1964) 20

Chapman v. Meier,
420 U.S. 1 (1975) 29

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2002) 15, 40, 41

City of Mobile v. Bolden,
446 U.S. 55 (1980) 11, 16-17

Connor v. Finch,
431 U.S. 407 (1977) 29

Daly v. Hunt,
93 F.3d 1212 (4th Cir. 1996) 15

Davis v. Mann,
377 U.S. 678 (1964) 31

Eastern R.R. President's Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 46

Gaffney v. Cummings,
412 U.S. 735 (1973) ..... *passim*

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1990) ..... *passim*

Gray v. Sanders,
372 U.S. 368 (1963) ..... *passim*

Hadley v. Junior Coll. Dist. of Metropolitan Kansas City, 397 U.S. 50 (1970) 34, 35, 36

Holt v. Richardson,
238 F. Supp. 468 (D. Hawaii 1965) 21, 22

Karcher v. Daggett,
462 U.S. 725 (1983) 27, 32, 50, 51

Kilgarlin v. Hill,
386 U.S. 120 (1967) 23, 30

Kilgarlin v. Martin,
252 F. Supp. 404 (S.D. Tex. 1966), *rev'd in part, Kilgarlin v. Hill*, 386 U.S. 120 (1967) (per curiam) 23

Kilgarlin v. Martin,
C.A. No. 63-H-390 (W.D. Tex. Jan. 11, 1965) 23

Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 32, 46, 51

Larios v. Cox,
300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam),
summarily aff'd, 542 U.S. 947 (2004) 33

Lucas v. Forty-Fourth General Assembly of State of Colo., 377 U.S. 713 (1964) 30

Mahan v. Howell,
410 U.S. 315 (1973) 18, 30

McGowan v. Maryland,
366 U.S. 420 (1961) 16

Md. Comm. for Fair Representation v. Tawes,
377 U.S. 656 (1964) 31

Personnel Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 16, 17

Reno v. Bossier Parish Sch. Bd.,
520 U.S. 471 (1997) 16, 17

Reynolds v. Sims,
377 U.S. 533 (1964) ..... *passim*

Rogers v. Lodge,
458 U.S. 613 (1982) 16, 17

Roman v. Sincock,
377 U.S. 695 (1964) 30

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 26

Swann v. Adams,
385 U.S. 440 (1967) 30

Tennant v. Jefferson Cnty. Comm'n,
133 S. Ct. 3 (2012) (per curiam).....31–32

Washington v. Davis,
426 U.S. 229 (1976).....16

Wells v. Rockefeller,
394 U.S. 542 (1969).....32

Wesberry v. Sanders,
376 U.S. 1 (1964).....14–15, 32

Whitcomb v. Chavis,
403 U.S. 124 (1971).....11, 30

White v. Regester,
412 U.S. 755 (1973).....10, 29

White v. Weiser,
412 U.S. 783 (1973).....32

Wisconsin v. City of New York,
517 U.S. 1 (1996).....45

WMCA, Inc. v. Lomenzo,
377 U.S. 633 (1964).....23

Yick Wo v. Hopkins,
118 U.S. 356 (1886).....33

Constitutional Provisions, Statutes, and Rules

U.S. Const. amend. XIV, § 1 3

U.S. Const. amend. XIV, § 2 .....3, 39, 41

Tex. Const. art. III, § 2.....57

Tex. Const. art. III, § 25.....4, 23

Tex. Const. art. III, § 28 3

28 U.S.C. § 1253 2

28 U.S.C. § 2284(a) 4

Act of May 21, 2011, 82d Leg., R.S., ch. 1315, 2011 Tex. Gen. Laws 3748 4

Act of June 21, 2013, 83d Leg., 1st C.S., ch. 1, 2013 Tex. Gen. Laws 4889 4

Fed. R. Civ. P. 12(b)(6) 6, 8

Other Authorities

ACS, U.S. Census Bureau, A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know (Oct. 2008) 52

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M. Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland's Test Case*, 43 U. Balt. L.F. 35 (2012) 28

J. Fishkin, *Weightless Votes*, 121 Yale L.J. 1888 (2012) 28

Nat'l Conf. of State Legislatures, Redistricting Law 2010 (2009) 28

Scot A. Reader,
One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts,
17 Harv. J.L. & Pub. Pol'y 521 (1994) 38

Joseph T. Sneed III,
Footprints on the Rocks of the Mountain: An Account of the Fourteenth Amendment (1997)...41

Tex. Att'y Gen. Op. No. MW-350 (1981) 23, 24

U.S. Census Bureau,
United States Census 2010 (2009) 52

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BRIEF FOR APPELLEES

INTRODUCTION

Texas reapportioned its state Senate districts by substantially equalizing total population, just as countless state and local governments have done for decades. As this Court explained almost 50 years ago, a State's decision to include or exclude non-voters in its apportionment base "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Burns v. Richardson*, 384 U.S. 73, 92 (1966). Since then, the Court has consistently relied on total population in upholding state legislative apportionments against invidious-vote-dilution claims under the Equal Protection Clause's one-person, one-vote principle. Texas's good-faith effort

here to equalize the total population of its state legislative districts likewise does not amount to invidious vote dilution under the Equal Protection Clause.

JURISDICTION

The district court entered judgment on November 5, 2014, and plaintiffs filed a timely notice of appeal on December 4, 2014. This Court has jurisdiction to review the decision of the three-judge district court under 28 U.S.C. § 1253. The political-question doctrine does not apply here under *Baker v. Carr*, 369 U.S. 186, 237 (1962).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> Section 1.
>
> > All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, §§ 1–2.

STATEMENT OF THE CASE

1. The Texas Constitution requires the Texas Legislature to reapportion its Senate districts during the first regular legislative session following the federal decennial census. Tex. Const. art. III, § 28. The Texas Constitution restricts that apportionment by requiring that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each

district shall be entitled to elect one Senator." *Id.* art. III, § 25.

Following the 2010 census the Texas Legislature passed a Senate reapportionment plan known as Plan S148. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 1315, 2011 Tex. Gen. Laws 3748. Voting Rights Act litigation immediately commenced. A three-judge district court enjoined Plan S148, which had not been precleared under VRA § 5, and issued an interim plan known as Plan S172 for the 2012 primary elections. J.S. App. 4a. In 2013, the Texas Legislature repealed Plan S148 and permanently adopted Plan S172. *See* Act of June 21, 2013, 83d Leg., 1st C.S., ch. 1, 2013 Tex. Gen. Laws 4889. Plan S172 provides for Senate districts of substantially equal total population based on the 2010 census. *See, e.g.*, Supp. J.S. App. 5–12.

2. Plaintiff Sue Evenwel lives in Titus County, Texas, which is in Senate District 1 of Plan S172. J.S. App. 19a–20a. Plaintiff Edward Pfenninger lives in Montgomery County, Texas, which is in Senate District 4. J.S. App. 20a. In 2014, plaintiffs sued the Texas Governor and Secretary of State in their official capacities, asserting that Plan S172's apportionment violates the Equal Protection Clause. Because plaintiffs brought a constitutional challenge to the apportionment of a statewide legislative body, the Chief Judge of the Fifth Circuit convened a three-judge district court. *See* 28 U.S.C. § 2284(a).

Plaintiffs alleged that Plan S172 violates the "one-person, one-vote" principle of the Equal Protection Clause by apportioning Texas Senate districts based

on total population, so that each district contains a substantially equal number of individuals without accounting for "the number of electors or potential electors." J.S. App. 18a. Plaintiffs conceded that Plan S172's total deviation from perfectly equal population across districts, using total population, is 8.04%. J.S. App. 5a. They alleged, however, that the districts vary to a larger degree in voter population. J.S. App. 25a–31a. Plaintiffs sought a judgment declaring that Plan S172 violates the Equal Protection Clause, an order enjoining the State from using Plan S172 to conduct any election, and an order requiring the Texas Legislature to reapportion the State's Senate districts. J.S. App. 34a.

Although plaintiffs alleged that the State could have configured its 31 Senate districts to reduce the variation in both total population and citizen-voting-age population, they did not offer a demonstrative plan. Nor did plaintiffs allege that they (or anyone else) had provided the Legislature with a proposed Senate plan that equalized both total and voter population. Instead, plaintiffs submitted to the district court a two-page declaration from a demographer, who stated that he generated "a redistricting plan adhering to Plan S172 districting as closely as possible but minimizing total population and CVAP [citizen-voting-age population] deviations." Supp. J.S. App. 3 (Declaration of Peter A. Morrison, Ph.D.). According to the declaration, that plan "eliminated the gross deviations in CVAP without significantly exceeding the 8.04% total population

deviation from ideal in Plan S172." Supp. J.S. App. 3. The demographer concluded that "there are many feasible ways to eliminate gross deviations in CVAP without causing significantly larger deviations in total population." He offered his opinion "that the large CVAP deviations in Plan S172 districts were not a necessary consequence of population equalization and that the distribution of CVAP could be substantially equalized among all 31 districts without departing from the goal of equalizing each district's total population." Supp. J.S. App. 3. Although the declaration states that he considered data from Plan S172, it provided no data from the demographer's own plan. Like the tables in plaintiffs' brief, Br. 9, 11–12, the calculations in the declaration reflect data related to Plan S172. Regarding the demographer's plan, the declaration states only that it "minimiz[ed] total population and CVAP deviations" and "eliminated the gross deviations in CVAP"; it does not specify the extent of the deviations or allege that they fell below 10%. Supp. J.S. App. 3. The demographer explained that he "was not asked to, and did not attempt to, devise a plan that would optimally balance these two deviations." Supp. J.S. App. 2.

Defendants moved to dismiss for failure to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b)(6), arguing that the Equal Protection Clause does not compel the State to use voter population rather than total population or to use a combination of the two. J.S. App. 6a.

3. The three-judge district court granted defendants' Rule 12(b)(6) motion to dismiss. J.S. App. 4a. The court's opinion noted that "the Supreme Court has generally used total population as the metric of comparison." J.S. App. 7a–8a (citing *Brown v. Thomson*, 462 U.S. 835, 837–40 (1983); *Gaffney v. Cummings*, 412 U.S. 735, 745–50 (1973); *Reynolds v. Sims*, 377 U.S. 533, 568–69 (1964)). The district court acknowledged that plaintiffs are "relying upon a theory never before accepted by the Supreme Court or any circuit court: that the metric of apportionment employed by Texas (total population) results in an unconstitutional apportionment because it does not achieve equality as measured by Plaintiffs' chosen metric—voter population." J.S. App. 9a.

The court rejected plaintiffs' assertion that their theory "is consonant with *Burns* [*v. Richardson*, 384 U.S. 73 (1966)]." J.S. App. 10a. The district court explained that *Burns*, in considering a Hawaii apportionment plan, "stated that a state's choice of apportionment base is not restrained beyond the requirement that it not involve an unconstitutional inclusion or exclusion of a protected group." J.S. App. 10a. This "amount of flexibility is left to state legislatures" because a decision about apportionment base "*involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.*" J.S. App. 10a–11a (quoting *Burns*, 384 U.S. at 92) (emphasis added by district court). The district court therefore "conclude[d] that Plaintiffs are asking us to 'interfere'

with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." J.S. App. 13a.

The district court thus dismissed plaintiffs' lawsuit for failure to state a claim under Rule 12(b)(6). It did so because plaintiffs admitted that Plan S172's "total deviation from ideal, using total population, is 8.04%"—which "falls below 10%," the deviation from equal population necessary to make out a prima facie case of invidious vote dilution under the Equal Protection Clause. J.S. App. 8a (citing *Brown*, 462 U.S. at 842–43). The district court did not address any issue of subject-matter jurisdiction under the political-question doctrine. Plaintiffs appealed, J.S. App. 1a, and this Court noted probable jurisdiction, 135 S. Ct. 2349 (2015) (mem.).

SUMMARY OF ARGUMENT

While "one-person, one-vote" has become a useful shorthand to describe a malapportionment claim, the underlying theory and basis for this claim is the Equal Protection Clause's general guarantee against invidious discrimination. Plaintiffs' one-person, one-vote challenge is therefore a claim of invidious vote dilution. To establish that a State committed invidious vote dilution in a legislative apportionment, plaintiffs must prove that the State reapportioned districts in an irrational manner or for the purpose of diluting voting strength.

When a State does not substantially equalize *any* population base across districts, the Court has inferred that the State could only be purposefully attempting to dilute votes. But that inference does not follow when a State substantially equalizes some reliable measure of total, citizen, or voting-eligible population. As this Court's previous one-person, one-vote cases illustrate, when a State has equalized some measure of population, the Court has rejected a claim of invidious vote dilution. *Burns v. Richardson* thus held that the Equal Protection Clause does not require States to reapportion based on any particular measure of population. States do not commit invidious vote dilution by simply choosing to use total—or voting-eligible—population when reapportioning.

Plaintiffs concede that Texas sufficiently equalized total population. Texas therefore did not engage in invidious vote dilution and did not violate the Equal Protection Clause. To the contrary, Texas relied on federal census data for the population base, and federal census data do not include citizenship data or any other measure of the voting-eligible population. Ultimately, plaintiffs propose an unworkable standard for reapportionment that would mire the Judiciary in further redistricting disputes, while subjecting States to charges of invidious vote dilution where they have made genuine, good-faith efforts to equalize population and provide fair representation.

ARGUMENT

I. PLAINTIFFS' CLAIM IS AN EQUAL PROTECTION CLAIM OF INVIDIOUS VOTE DILUTION.

Plaintiffs challenge the Texas Senate reapportionment under the one-person, one-vote doctrine. As the Court's one-person, one-vote cases clarify, this challenge is a claim of invidious vote dilution under the Equal Protection Clause. And a claim of invidious vote dilution requires plaintiffs to show either that the reapportionment was irrational or made with the purpose of diluting votes.

A. A One-Person, One-Vote Claim Is a Claim of Invidious Vote Dilution.

A "one-person, one-vote" challenge to state legislative reapportionment is a claim of invidious discrimination under the Equal Protection Clause. *See, e.g.*, *Brown v. Thompson*, 462 U.S. 835, 842 (1983) ("invidious discrimination under the Fourteenth Amendment"); *White v. Regester*, 412 U.S. 755, 764 (1973) ("invidious discrimination under the Equal Protection Clause"); *Gaffney v. Cummings*, 412 U.S. 735, 736 (1973) (same); *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) ("invidious discrimination violative of rights asserted under the Equal Protection Clause").

Specifically, it is a claim of invidious vote dilution. *See, e.g.*, *Brown*, 462 U.S. at 846 ("alleged dilution of their voting power"); *Gaffney*, 412 U.S. at 746 (rejecting claim "that any person's vote is being substantially diluted"); *Reynolds*, 377 U.S. at 566

(claim of "[d]iluting the weight of votes because of place of residence").

The basis for a one-person, one-vote claim has been clear since the Court first applied the doctrine to a state legislative apportionment in *Reynolds v. Sims*. As *Reynolds* explained, "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race, or economic status." *Reynolds*, 377 U.S. at 568 (citation omitted); *contra Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("[T]he relationship between population and legislative representation [is] a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex.").

Subsequent vote-dilution cases reflect the same principle: a claim of unconstitutional vote dilution requires a showing of invidious discrimination. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124, 155 (1971) ("[I]t would not follow that the Fourteenth Amendment had been violated unless it is invidiously discriminatory . . . ."); *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality op.) ("We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.").

This understanding of a one-person, one-vote claim also appears in the Court's initial application of

the one-person, one-vote principle. The Court first used the phrase "one-person, one-vote" to invalidate a vote-tabulation system that assigned votes unequal weight according to the county in which they were cast. The Court soon expanded the concept to reach facially neutral apportionment plans creating the functional equivalent of weighted votes. The label "one-person, one-vote" thus evolved into a shorthand for claims of invidious vote dilution under the Equal Protection Clause by malapportionment.

The Court first used the phrase "one person, one vote" in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), in deciding a challenge to Georgia's county-unit system, which facially discriminated against voters in certain counties by counting their votes at less than full value in statewide primary elections. *Gray* was not an apportionment case, and it did not concern the composition of state legislatures. Rather, Georgia's county-unit system mimicked the Electoral College by assigning a certain number of unit votes to each county and awarding all of the county's unit votes to the winner of the county's popular vote. This system purported "to achieve a reasonable balance as between urban and rural electoral power." *Id.* at 370. In practice, however, the unequal allocation of unit votes created a substantial imbalance in favor of rural counties to the clear detriment of urban residents.[1]

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[1] Georgia had a population of 3,943,116 under the 1960 census. *Gray*, 372 U.S. at 371. Under the law that applied at the time the suit was filed, Fulton County, with a population of 556,326, accounted for 14.11% of the State's population but received only

The allocation of unit votes subverted majority rule; it gave "a clear majority of county units" to counties with one-third of the total state population. *Id.* at 373.

Because the county-unit system deliberately favored certain rural counties, *Gray* presented a case of unequal treatment—some votes actually counted more than others. As the Court explained:

> Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties.

Id. at 379. The Court thus held that the Equal Protection Clause forbids States to give "twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area." *Id.*

To prevent overt discrimination against urban residents, *Gray* established a rule of equal treatment:

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6 unit votes, which accounted for only 1.46% of the 410 total unit votes. *Id.* Echols County, whose census population of 1,876 accounted for only 0.05% of the statewide total, received 1 unit vote, which accounted for 0.48% of the statewide total. *Id.* As a result, "[o]ne unit vote in Echols County represented 938 residents, whereas one unit vote in Fulton County represented 92,721 residents," and "one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County." *Id.*

"Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Id.* In short, vote-weighting is prohibited: "Every voter's vote is entitled to be counted once." *Id.* at 380.

The one-person, one-vote doctrine soon expanded beyond *Gray* from vote-weighting systems to malapportioned state legislative districts that created the functional equivalent of weighted votes—through representation in legislatures premised on wide variations in district populations. These malapportionment claims did not allege that States were weighting votes in determining which candidate would win the election. Instead, they alleged that there were wide disparities in the number of people each duly elected candidate represented, which amounted to the functional equivalent of vote-weighting because an individual's vote could have different proportional strength depending on the number of other voters in a district.[2] *See, e.g.*, *Reynolds*, 377 U.S. at 568.

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[2] The Court recognized a similar claim against malapportioned congressional districts, but it relied on the distinct provision for the U.S. House of Representatives in Article I, § 2, that "Representatives shall be chosen 'by the People of the several States' and shall be 'apportioned among the several States . . . according to their respective Numbers.'" *Wesberry v. Sanders*,

The Court initially held that claims against state apportionments were justiciable on the ground that "[j]udicial standards under the Equal Protection Clause are well developed and familiar," so courts could determine "that a discrimination reflects no policy, but simply arbitrary and capricious action."[3] *Baker*, 369 U.S. at 226. In the Court's first decision on the merits of a state apportionment claim, *Reynolds* remarked that the Alabama legislative districts at issue "presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone." 377 U.S. at 568. *Reynolds*

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376 U.S. 1, 17 (1964). It explained that population-based apportionment of a State's congressional districts is necessary to ensure "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," *id.* at 7–8, and to follow "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives," *id.* at 18.

[3] Because the Court determined in *Baker v. Carr* that vote-dilution challenges to apportionment plans are justiciable, the political-question doctrine does not divest the Court of jurisdiction to adjudicate plaintiffs' claim. 369 U.S. at 237. But the Court should reject plaintiffs' claim on the merits because the Equal Protection Clause does not compel States to use a particular population base when reapportioning; the Constitution therefore leaves with the States the ability to determine which population base should be equalized. *See, e.g.*, *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000) ("this eminently political question has been left to the political process"); *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) ("This is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment.").

went on to hold that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.*

Gray and *Reynolds* thus applied equal-protection principles to a particular set of claims. The phrase "one-person, one-vote" serves as a convenient shorthand for those claims. But it should not obscure the reality recognized throughout the Court's one-person, one-vote cases that such a challenge to state legislative reapportionment is a claim of invidious vote dilution under the Equal Protection Clause.

B. A State Does Not Commit Unconstitutional Vote Dilution Unless It Acts Irrationally or for an Impermissible Purpose.

Because a one-person, one-vote challenge to a state legislative apportionment alleges invidious vote dilution, it is "subject to the standard of proof generally applicable to Equal Protection Clause cases." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982). The Equal Protection Clause does not forbid state action that merely affects some individuals differently than others. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("[T]he Fourteenth Amendment guarantees equal laws, not equal results."). A claim of mere disparate impact does not violate the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229, 240 (1976); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) (citing *Bolden*, 446 U.S. at

62). Unless the challenged state action is arbitrary or irrational, liability requires a showing of discriminatory purpose—that is, proof "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279 (footnote omitted).

Consistent with general equal-protection principles, this Court has held that absent arbitrary or irrational state action, a State does not commit invidious vote dilution unless it intentionally discriminates against an identifiable group of voters. *Bossier*, 520 U.S. at 481 (citing *Bolden*, 446 U.S. at 62); *Rogers*, 458 U.S. at 618–19. Plaintiffs' obligation to prove discriminatory purpose "is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." *Rogers*, 458 U.S. at 619 (quoting *Bolden*, 446 U.S. at 66). To prevail on a claim of invidious vote dilution under the Equal Protection Clause, a plaintiff must prove that the challenged state law is an irrational or arbitrary exercise of the State's power, or that the challenged state law reflects a deliberate effort to dilute votes.

In accordance with this standard, the Court's one-person, one-vote decisions have found violations of the Equal Protection Clause where state apportionments did not sufficiently equalize *any* population base. *See infra* Part II.B. And when a State does not substantially equalize any population base, the Court

has essentially inferred that the State could only be purposefully attempting to dilute votes by subordinating population principles to other factors. *See id.*

II. A GOOD-FAITH EFFORT TO EQUALIZE TOTAL, CITIZEN, OR VOTING-ELIGIBLE POPULATION SATISFIES THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause is satisfied when a State "make[s] an honest and good faith effort" to equalize population among legislative districts. *Mahan v. Howell*, 410 U.S. 315, 324-25 (1973) (quoting *Reynolds*, 377 U.S. at 577). This Court therefore held in *Burns* that the Equal Protection Clause does not compel a State to choose a particular population base when reapportioning. Thus, a State does not engage in invidious vote dilution when it substantially equalizes a reliable measure of total, citizen, or voting-eligible population. States are therefore permitted to use total population when they reapportion, and they are also entitled to choose citizen or voting-eligible population. This choice does not violate the Equal Protection Clause.

A. *Burns v. Richardson* Held that the Equal Protection Clause Does Not Require States to Reapportion Based on a Particular Measure of Population.

Burns v. Richardson, 384 U.S. 73 (1966), refutes plaintiffs' argument that the Equal Protection Clause requires States to apportion legislative seats based on

some measure of voter population. The Court held in *Burns*:

> [T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in [*Reynolds*] and most of the others decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population. . . . Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. *The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.* Unless a choice is one the Constitution forbids, the resulting

> apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.

384 U.S. at 91–92 (internal citation and footnotes omitted; emphasis added).[4]

The decision to include voting-ineligible populations in the apportionment base is therefore a choice "about the nature of representation" that the Equal Protection Clause leaves to the States. *Id.* And unless a State's decision to include or exclude a certain population is arbitrary, irrational, or invidious, compliance with the one-person, one-vote principle will be measured against the State's chosen apportionment base. *Id.*

In rejecting the view that the Equal Protection Clause restricts the States to a single apportionment

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[4] As an example of a choice that the Constitution forbids, the Court cited *Carrington v. Rash*, 380 U.S. 89 (1965), which considered a provision of the Texas Constitution barring members of the armed forces who moved to Texas during the course of their military duty from becoming residents for voting purposes as long as their service continued, *see id.* at 89, 91–92. The Court held that although the State was entitled to enforce residency requirements, its rule "forbidding a soldier ever to controvert the presumption of non-residence impose[d] an invidious discrimination in violation of the Fourteenth Amendment." *Id.* at 96. Discussing the case in *Burns*, the Court explained, "The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting a State's residence requirements is a difference between an arbitrary and a constitutionally permissible classification." 384 U.S. at 92 n.21.

base, *Burns* identified at least two generally permissible options: total population and citizen population. The Court recognized that Hawaii faced "special population problems," namely a substantial number of tourists and military personnel concentrated in certain parts of Oahu, which "might well have led it to conclude that state citizen population rather than total population should be the basis for comparison." *Id.* at 94. But *Burns* did not imply, let alone hold, that the Constitution forbids apportionment based on total population.[5] It held only that because of Hawaii's unique circumstances, "a finding that registered voters distribution does not approximate total population distribution is insufficient to establish constitutional deficiency," *id.* at 94–95; Hawaii could meet constitutional standards if "the distribution of registered voters approximates distribution of state citizens or another permissible population base," *id.* at 95.

The Court upheld Hawaii's use of registered voters because the resulting apportionment "substantially approximated that which would have appeared had state citizen population been the guide."

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[5] Plaintiffs suggest that the Court believed a total-population-based apportionment would have produced "grossly absurd and disastrous results." *See* Br. 35. As the opinion indicates, however, the quoted statement came from the district court's opinion. *See Burns*, 384 U.S. at 94 (quoting *Holt v. Richardson*, 238 F. Supp. 468, 474 (D. Hawaii 1965)).

Id. at 96.[6] In other words, voter-registration population was permissible in that particular context because Hawaii's voter-registration population approximated the state citizen population—not, as plaintiffs assert, "because it led to the same place as apportionment based on eligible voters." Br. 36. The Court's reference to "state citizens or another permissible population base" makes clear that state citizenship is one of multiple permissible population bases. 384 U.S. at 95.

Burns stopped short of endorsing the use of registered voters or actual voters as a generally permissible apportionment base. It explained that either apportionment base "presents an additional problem" because neither is a strictly population-based measure; each also depends "upon the extent of political activity of those eligible to register and vote." *Id.* at 92. The Court concluded that Hawaii's use of registered voters satisfied the Equal Protection Clause only because "on this record it . . . produced a

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[6] Plaintiffs state, incorrectly, that *Burns* used "state citizen population" as a "shorthand for '[s]tate citizen population eligible to vote (*i.e.*, voter population).'" Br. 35 (citing 384 U.S. at 84 n.12). The Court distinguished overall citizen population from voting-eligible citizen population. The cited footnote quoted the district court's list of population measures that the Hawaii Legislature might consider at a constitutional convention. That list included "total population," "citizen population," and "State citizen population eligible to vote (*i.e.*, voter population)." *Burns*, 384 U.S. at 84 n.12 (quoting 238 F. Supp. at 478). Neither the district court nor this Court conflated state citizen population and voting-eligible population.

distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93.

The Court's endorsement of citizen-based apportionment in *Burns* casts no doubt on the validity of total population as a permissible apportionment base. *See id.* at 91–92. The Court even stated that it had "treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure." *Id.* (citing *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964)). This implies that total population, like state citizenship, is a constitutionally permissible apportionment base, although neither is constitutionally required.[7]

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[7] Plaintiffs note that the Texas Constitution previously provided for the apportionment of Senate districts "according to the number of qualified electors," Br. 4 (quoting Tex. Const. art. III, § 25 (2000)), and that the Texas Attorney General opined, in a non-binding 1981 opinion, that this provision was facially unconstitutional, *id.* The Attorney General's opinion rested solely on an unpublished summary judgment order, which found the provision unconstitutional under *Reynolds* because it did not require Senate districts "as nearly of equal population as is practicable." *See* Tex. Att'y Gen. Op. No. MW-350 at 2 (1981) (citing *Kilgarlin v. Martin*, C.A. No. 63-H-390 (W.D. Tex. Jan. 11, 1965)); *see also Kilgarlin v. Martin*, 252 F. Supp. 404, 411 (S.D. Tex. 1966) (describing summary judgment ruling), *rev'd in part*, *Kilgarlin v. Hill*, 386 U.S. 120 (1967) (per curiam) (considering claims against the apportionment of Texas House seats). Although the summary judgment order was issued before *Burns* upheld Hawaii's apportionment based on registered voters, and even though the Attorney General's opinion cited *Burns* in its

B. A State Does Not Commit Invidious Vote Dilution When It Makes a Good-Faith Effort to Equalize Total, Citizen, or Voting-Eligible Population.

When a State uses some reliable measure of total, citizen, or voting-eligible population to apportion state legislative seats, that fact generally suffices to ensure that the State has not engaged in invidious vote dilution. The Court's one-person, one-vote cases have found violations of that principle when States failed to sufficiently equalize *any* population base. In those cases, the Court has inferred invidious discrimination. But when a State equalizes some reliable measure of population, it is much more difficult to infer an invidious intent to dilute voting strength. Indeed, *Reynolds* described the inquiry as whether a State was subordinating general population principles for other concerns: if "population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." 377 U.S. at 581.

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background discussion of federal law, *see* Tex Att'y Gen Op. No. MW-350 at 1, the opinion did not mention *Burns* in its analysis of the constitutional provision for Senate apportionment based on qualified electors, *see id.* at 2.

1. Substantial population equality generally satisfies the Equal Protection Clause.

The Court recognized in *Reynolds* that "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." *Id.* at 577. When the record demonstrates a maximum deviation among districts of less than 10%, the Court has generally been "quite sure that a prima facie case of invidious discrimination under the Fourteenth Amendment was not made out." *Gaffney*, 412 U.S. at 751. But a state legislative plan with a deviation greater than 10% "creates a prima facie case of discrimination and therefore must be justified by the State." *Brown*, 462 U.S. at 843. Total-population equality therefore is not merely a means to the end of voter-population equality; it serves as a constitutionally sufficient indicator that a State has complied with the Equal Protection Clause by apportioning its legislature "on a population basis." *Reynolds*, 377 U.S. at 568. Only when the deviation exceeds 10% does numerical disparity permit an inference that the State has "submerge[d] the equal-population principle." *Id.* at 576.

The Court's adoption of a 10% deviation threshold for state legislative apportionments reflects the fundamental nature of the right to vote. *E.g.*, *id.* at 561–62. And the consistent application of that standard confirms that equalization of total

population among districts generally satisfies the Equal Protection Clause.

Plaintiffs say that the Court's one-person, one-vote decisions merely assumed congruence between total population and voter population. *See* Br. 27. But the Court has consistently distinguished between residents, citizens, and voters. *E.g.*, *Burns*, 384 U.S. at 94–95; *Reynolds*, 377 U.S. at 577. It has recognized that total population does not track voter population precisely, and it has repeatedly upheld state legislative apportionments that substantially equalized total population.

The Court alluded to the disparity between total and voter population in *Burns* when it raised doubts about apportionment based on registered or actual voters. According to the Court, voter-based apportionment would be "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process." 384 U.S. at 92. And the Court knew that the gap might be especially wide in States where levels of black voter registration lagged far behind white voter registration. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) (noting that white registration levels ran "roughly 50 percentage points or more ahead" of black registration levels in Alabama, Louisiana, and Mississippi).

In *Gaffney v. Cummings*, the Court upheld a state legislative reapportionment based on total population,

while cataloging the potential disparities resulting from apportionment based on census population:

> [I]f it is the weight of a person's vote that matters, total population—even if stable and accurately taken—may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because "census persons" are not voters. The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States. The six congressional districts in Connecticut, for example, vary from one another by as much as 4% in their age-eligible voters . . . . Other States have congressional districts that vary from one another by as much as 29% and as little as 1% with respect to their age-eligible voters. And these figures tell us nothing of the other ineligibles making up the substantially equal census populations among election districts: aliens, nonresident military personnel, nonresident students, for example.

412 U.S. at 746–47 (footnotes omitted); *cf. Karcher v. Daggett*, 462 U.S. 725, 772 n.8 (1983) (noting that because of factors including "the failure of many registered voters to cast ballots, the weight of a citizen's vote in one district is inevitably different from that in others"). *Gaffney* nevertheless stated that, where the deviation in total population was

about 8%, "we are quite sure that a prima facie case of invidious discrimination under the Fourteenth Amendment was not made out." 412 U.S. at 751.

The Court has had many occasions to require an alternative apportionment base besides total population. After all, States typically apportion their legislative seats based on total population. *See, e.g.*, J. Fishkin, *Weightless Votes*, 121 Yale L.J. 1888, 1890 (2012) ("Today, line-drawers across the nation rely almost uniformly on total population . . . ."); M. Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland's Test Case*, 43 U. Balt. L.F. 35, 41 (2012) ("most jurisdictions use total population as the base" (citing Nat'l Conf. of State Legislatures, Redistricting Law 2010 at 11 (2009))).[8]

But despite its awareness that total population may not track the citizen or voting-eligible population, the Court has consistently looked to total population as a measure of equal apportionment of state legislative districts:

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[8] As the appendix to this brief demonstrates, a clear majority of States rely on total population in apportioning state legislative districts. Only a small minority of States—California, Delaware, Hawaii, Kansas, Maine, Maryland, Nebraska, New Hampshire, New York, and Washington—have constitutional or statutory provisions that exclude particular groups from the apportionment base. These provisions variously authorize the exclusion of aliens, nonpermanent residents, nonresident military personnel, and inmates who were not state residents prior to incarceration.

- *Brown v. Thomson*, 462 U.S. 835, 837–41 (1983) (upholding apportionment of one representative to a county of 2,924 persons where "ideal apportionment" based on 1980 census would be 7,337 persons per representative);
- *Connor v. Finch*, 431 U.S. 407, 416–17 (1977) (disapproving court-ordered state legislative plans with maximum deviations of 16.5% and 19.3% from "absolute population equality," calculated by dividing state population by number of districts);
- *Chapman v. Meier*, 420 U.S. 1, 26–27 (1975) (holding that court-ordered state legislative reapportionment with total deviation of 20.14% based on 1970 census did not "achieve the goal of population equality with little more than de minimis variation");
- *White v. Regester*, 412 U.S. 755, 764 (1973) (holding that total deviation of 9.9% from equal population in state legislative plan did not meet "the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause");
- *Gaffney v. Cummings*, 412 U.S. 735, 745–50 (1973) (upholding state legislative plan with maximum deviation from "perfect census-population equality" of 7.83% in state house and 1.81% in state senate);

- *Mahan v. Howell*, 410 U.S. 315, 322 (1973) (upholding state legislative plan with total deviation of 16.4%);
- *Whitcomb v. Chavis*, 403 U.S. 124, 161–62 (1971) (holding that state legislative apportionment with total deviation from census population of 28.20% in senate and 24.78% in house did not comply with Equal Protection Clause);
- *Kilgarlin v. Hill*, 386 U.S. 120, 122–26 (1967) (disapproving state legislative apportionment plan with total deviation of 26.48%);
- *Swann v. Adams*, 385 U.S. 440, 442–45 (1967) (disapproving state legislative apportionment with total deviation of 26.65% in Senate districts and 33.55% in House districts);
- *Lucas v. Forty-Fourth General Assembly of State of Colo.*, 377 U.S. 713, 728–35 (1964) (finding legislative apportionment method in which counties containing 33.2% of State's total population elected a majority of the Senate "clearly involves departures from population-based representation too extreme to be constitutionally permissible");
- *Roman v. Sincock*, 377 U.S. 695, 708–10 (1964) (holding that state legislature was not apportioned substantially on a population basis where it would result in "two-thirds of the Senate being elected from districts where only about 31% of the State's population

reside . . . [and] 21% of the State's population would be represented by a majority of the members of the Delaware Senate");

- *Davis v. Mann*, 377 U.S. 678, 688–92 (1964) (holding state legislative apportionment invalid where 40.5% of State's population lived in districts electing majority of House members and 41.1% of State's total population lived in districts electing majority of Senate);
- *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 664–65 (1964) (holding that state legislative apportionment with maximum population-variance ratio of 32-to-1 for senate and 12-to-1 for house was not sufficiently based on population);
- *Reynolds v. Sims*, 377 U.S. 533, 545–50, 568–69 (1964) (holding that state legislative apportionment with population-variance ratios of up to 41-to-1 in the senate and 16-to-1 in the house in existing plan, and up to 59-to-1 in the senate and 4.7-to-1 in the house under amended plan involved "deviations from a strict population basis [that] are too egregious to permit us to find that that body. . . was apportioned sufficiently on a population basis).[9]

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[9] The Court has similarly relied on total-population data to determine the constitutionality of state congressional apportionment plans under the stricter standard of Article I, § 2. *See, e.g.*, *Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 8

Plaintiffs are therefore wrong to suggest that the Court neglected the question of what population the States must equalize because of "the lack of any need for further refinement." Br. 27. If plaintiffs were right about *Baker* and *Reynolds*—that is, if the Equal Protection Clause required the Court to ensure that state legislative districts contained equal voting populations—the Court could not have assumed that voter population tracked total population in those cases. It would have had no choice but to require proof

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(2012) (per curiam) (holding that a total-population deviation of 0.79% "results in no more (or less) vote dilution today than in 1983, when this Court said that such a minor harm could be justified by legitimate state objectives"); *Abrams v. Johnson*, 521 U.S. 74, 98–99 (1997) (upholding district court plan that had overall population deviation of 0.35%, and average deviation of 0.11%, noting that "[i]f population allocation in Georgia were perfect, each district would have 588,928 people, according to 1990 census data"); *Karcher v. Daggett*, 462 U.S. 725, 728, 738 (1983) (holding that small deviations from "ideal" figure of "average population per district (as determined by 1980 census)" could have been "avoided or significantly reduced with a good-faith effort to achieve population equality"); *White v. Weiser*, 412 U.S. 783, 784–85 (1973) (disapproving congressional plan with total deviation of 4.13%, based on Census population); *Wells v. Rockefeller*, 394 U.S. 542, 545–47 (1969) (disapproving congressional plan with total deviation of 13.1%); *Kirkpatrick v. Preisler*, 394 U.S. 526, 528–32 (1969) (disapproving congressional plan with total deviation of 5.97% from "absolute population equality" based on the 1960 Census); *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964) (applying one-person, one-vote doctrine to invalidate apportionment of congressional districts in which one congressman represented two to three times as many people as were represented by congressmen from other Georgia districts violated equal protection).

that the total population approximated the voter population. Yet the Court has made no such assumption. And neither has it required proof of equal voter population.

It does not follow, however, that a State is categorically immune from equal-protection claims as long as it equalizes total population across districts. For example, if there were evidence that a State chose to apportion its legislative seats based on total population for the *specific purpose* of favoring or disfavoring a particular group of voters, a member of the disfavored group could bring a plausible claim of invidious vote dilution. *See, e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam), *summarily aff'd*, 542 U.S. 947 (2004). A voter would also have a vote-dilution claim if a State enacted a plan that created thirty districts containing only one eligible voter while placing all other eligible voters in the remaining district. *Cf.* Br. 36. Plaintiffs allege no such absurd result here. Even if it were possible to create such an apportionment plan, that plan would so obviously disadvantage an identifiable group of voters that it would fail the basic test of rationality. *Reynolds*, 377 U.S. at 568. And in the extreme case that plaintiffs imagine, the State's action could not be explained as anything but a deliberate attempt to injure the disfavored group. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). But when a State makes a good-faith effort to create legislative districts of substantially equal population, as Texas

did here, there is no basis to infer invidious discrimination.

2. The apportionment goal of population equality is not in tension with the goal of voting equality.

This Court's continued reliance on total population to judge the constitutionality of state legislative apportionments creates no conflict with statements to the effect that "the relevant inquiry is whether 'the vote of any citizen is approximately equal in weight to that of any other citizen.'" *Bd. of Estimate v. Morris*, 489 U.S. 688, 701 (1989) (quoting *Reynolds*, 377 U.S. at 579), *cited in* Br. 27; *cf. Hadley v. Junior Coll. Dist. of Metropolitan Kansas City*, 397 U.S. 50, 56 (1970) ("[E]ach district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."); Br. 26–28. Considered in context, these statements just reaffirm the principle that States cannot subordinate population equality to other concerns when apportioning. So if a State creates districts of substantially equal population, it has generally satisfied the Equal Protection Clause and cannot be charged with invidious vote dilution.

This Court's decision in *Hadley* does not support plaintiffs' argument because the Court made no effort to ensure that the districts under scrutiny there contained an equal number of voters. The apportionment plan in *Hadley* was not based on voters

but on "'school enumeration,' defined as the number of persons between the ages of six and 20 years, who reside in each district." 397 U.S. at 51. State law permitted school districts to form consolidated junior college districts, governed by six trustees, and it provided generally for at-large elections. If any school district contained one-third to one-half of the total enumeration, it would elect two trustees; if any district contained one-half to two-thirds, it would elect three trustees; and if any district contained more than two-thirds, it would elect four trustees. *Id.* at 56–57. Trustees of the Kansas City School District claimed that their votes were unconstitutionally diluted because the district contained roughly 60% of the school enumeration but elected only three of the six trustees. *Id.* at 51–52.

The Court first rejected the argument that trustee elections were not subject to the one-person, one-vote principle. *Id.* at 56 (holding that trustees' exercise of "a vital governmental function" made them "governmental officials in every relevant sense of that term"). The Court then held that the apportionment plan violated the Equal Protection Clause, but not because it failed to use voter population. Rather, the Court found "built-in discrimination" because the number of trustees apportioned to large school districts always corresponded to the bottom of the relevant population range. As a result, voters in large districts would "frequently have less effective voting power than residents of small districts," but the formula prevented them from having more. *Id.* at 57

The Court cautioned that the question would be different "if the deviation from equal apportionment . . . resulted from a plan that did not contain a built-in bias in favor of small districts, but rather from the inherent mathematical complications in equally apportioning a small number of trustees among a limited number of component districts." *Id.* at 58. And the Court declined to decide "whether school enumeration figures, rather than actual population figures, can be used as a basis of apportionment." *Id.* at 57 n.9 (citing *Burns*, 384 U.S. at 90–95). It did so because "even if school enumeration is a permissible basis, [it] fails to apportion trustees constitutionally." *Id.* Thus, the Court contrasted school enumeration figures with "actual population figures," and it never specified voter population. *Id.* Despite a genuine question whether the government's chosen apportionment base was permissible, the Court relied on that base in judging the vote-dilution claim.

Similarly, the Court's decision in *Board of Estimate v. Morris* relied exclusively on total population figures to determine whether the City of New York satisfied its obligation to ensure substantially equal voting power among districts. The City's Board of Estimate comprised eight members: three officials elected citywide, each of whom cast two votes, and the presidents of the City's five boroughs, each of whom cast one vote. 489 U.S. at 694. As in *Hadley*, the initial question was whether the one-person, one-vote principle applied. The Court ruled that it did. *Id.* at 694–96. The Court then held that the

City's apportionment violated the Equal Protection Clause because of a disparity in the total population of the boroughs. *Id.* at 700 n.7 (explaining calculation of the ideal population, and the percentage of deviation, based on the parties' stipulation "that the city's total population is 7,071,030"). It agreed with the district court's conclusion that "the disparate borough populations produced a total deviation of 132.9% from voter equality among these electorates," *id.* at 691, ultimately concluding that the City could not justify "such a substantial departure from the one-person, one-vote ideal," *id.* at 703. Just like many other one-person, one-vote cases, starting with *Reynolds*, the Court relied only on total-population data.

3. *Baker* and *Reynolds* do not require the States to rely on voter population.

Plaintiffs cannot avoid this Court's consistent examination of total population in applying the Equal Protection Clause by focusing exclusively on *Baker* and *Reynolds*. *See* Br. 44 ("*Baker* and *Reynolds* are foundational rulings that must be interpreted on their own terms."). *Baker* did not even address the merits of a one-person, one-vote claim.[10] And in any event, this

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[10] *Baker v. Carr* held that a challenge to malapportioned state legislative districts presented a justiciable claim under the Equal Protection Clause. 369 U.S. at 237. But because the district court had dismissed the complaint for lack of subject-matter jurisdiction and failure to state a claim, the Court remanded without addressing the merits. *Id.* at 188, 237.

argument fails on its own terms. If the question is whether *Baker* and *Reynolds* compel the States to use some measure of voter population for apportionment, the Court has already answered it in the negative. Just a few years after those decisions, *Burns* held that a State's decision to include non-voters in the apportionment base "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." 384 U.S. at 92.

Before *Burns*, *Reynolds* had ruled that "both houses of a bicameral state legislature must be apportioned on a population basis." *Reynolds*, 377 U.S. at 568. *Burns* then held that the one-person, one-vote principle set forth in *Reynolds* did not require the States to use any particular population base for state legislative apportionment. As *Burns* explained, *Reynolds* "carefully left open the question what population was being referred to," as the Court "discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population." 384 U.S. at 91; *see also* Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 Harv. J.L. & Pub. Pol'y 521, 523 (1994) (noting that "*Reynolds* failed to distinguish between plans that place an equal number of people, citizens, or voters in all districts, and cases in the *Reynolds* progeny have never suggested that total population-based districting plans may be

constitutionally infirm") (footnote omitted). Considered in the light of *Burns*, as it must be, *Reynolds* cannot be read to impose plaintiffs' preferred apportionment base as a constitutional imperative. *Cf.* Br. 26.

4. The text and history of the Fourteenth Amendment do not support plaintiffs' interpretation of the Equal Protection Clause.

Even if *Burns* had not already rejected plaintiffs' reading of *Baker* and *Reynolds*, their argument would fail under the text of the Fourteenth Amendment, which does not provide a specific standard for state legislative apportionment. This is telling because Section 2 of the Fourteenth Amendment refers exclusively to the allotment of *congressional* seats *among* the States, based on "the whole number of persons in each State." U.S. Const. amend. XIV, § 2. This text indicates that the framers of the Fourteenth Amendment accepted total-population equality as a permissible method of apportionment.

The Fourteenth Amendment's text does not indicate that the framers intended to provide a specific rule for state legislative apportionment. Plaintiffs nevertheless argue that the general language of the Equal Protection Clause prohibits the States from employing the total-population measure, even though that measure is expressly provided in Section 2 of the Fourteenth Amendment for determining the number of Members of Congress allocated to each State. Br. 26. And plaintiffs say the

Equal Protection Clause compels the States to employ a specific alternative measure, ensuring an equal number of voters in each district. *Id.* Plaintiffs do not explain how or why the framers would forbid total-population-based apportionment with the general phrase "equal protection" in Section 1 of the Fourteenth Amendment, only to expressly endorse allocation of representatives based on total population in Section 2.

Historical circumstances also confirm that the framers of the Fourteenth Amendment did not intend to require voter population to be used for state legislative districts. The Fifth Circuit analyzed that history in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), and concluded that the "proponents of the Fourteenth Amendment had a meaningful debate on the question" of which population measure should be used in apportionment, but that the debate "cannot be said to have been definitively resolved," *id.* at 527.

Two historical facts recounted in *Chen* cast doubt on the notion that the Equal Protection Clause requires States to apportion based on voter population. First, the "drafters of the Fourteenth Amendment, on which *Reynolds* itself rests, do appear to have debated th[e] question, and rejected a proposal rooted in—among other things—the principle of electoral equality." *Id.* Second, the "[d]ebates over the precise basis for apportionment of Congress among the states proved a contentious issue throughout the process that led to the creation of section 2 of the [Fourteenth] Amendment." *Id.* In their "debate over

whether to base apportionment on potential voters, citizens, or population," the framers recognized "that aliens were unevenly distributed throughout the country," and that the western States contained an "overabundance of males." *Id.* Northern States opposed apportionment based on citizenship because they had large alien populations, and the New England States opposed apportionment based on "eligible voters rather than total population" due to the "relative preponderance of women in those states." *See id.* at 527 n.18 (citing Joseph T. Sneed III, Footprints on the Rocks of the Mountain: An Account of the Fourteenth Amendment 103–04, 145 (1997)).

The framers of the Fourteenth Amendment did not conclusively settle this debate. *Id.* at 527 The final version of Section 2 instead provides "generally for the use of total population figures for purposes of allocating the federal House of Representatives among the states" while also including a "mechanism to insure that egregious departures from the principle of *electoral* equality—the disenfranchisement of adult male 'citizens'—would be penalized." *Id.* (discussing U.S. Const. amend. XIV, § 2). In light of this history, *Chen* expressed "some difficulty in reading the Equal Protection Clause to require the adoption of a particular theory of political equality." *Id.* The Court's recognition, in *Burns*, that the Equal Protection Clause does not require the use of a particular apportionment base accords with this history of the Fourteenth Amendment.

Plaintiffs cannot avoid the Fourteenth Amendment's text and history by characterizing the State's argument as an attempt to revive the federal analogies that this Court rejected in *Gray* and *Reynolds*. *See* Br. 42–44. Texas is not trying to justify its practices by simply analogizing to a procedure in federal elections expressly authorized by the Constitution. And Texas is not trying to justify vote-weighting or its functional equivalent, which the Court also rejected in *Gray* and *Reynolds*. Rather than claim that States should be able to borrow practices established in the Constitution for federal elections, Texas relies on the text and history of the Fourteenth Amendment, which confirm that States generally do not violate the Equal Protection Clause by choosing a method of population-based apportionment.

In *Gray* and *Reynolds*, the States argued that certain structural features of the federal government—namely, the Electoral College and the apportionment of two Senate seats and at least one congressional seat to each State regardless of population—provided constitutional approval of weighted votes and apportionment of state legislative seats without regard to population. *See Gray*, 372 U.S. at 376–78; *Reynolds*, 377 U.S. at 571–72. The Court rejected those arguments because the constitutional structure of the federal government did not apply to the States. *Gray*, for example, explained that the "conception of political equality" that animated the Electoral College "belongs to a bygone day, and should not be considered in determining what the Equal

Protection Clause of the Fourteenth Amendment requires in statewide elections." 372 U.S. at 376 n.8. And in *Reynolds*, the Court stated that "the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted." 377 U.S. at 573. That system, it explained, was "conceived out of compromise and concession," which arose "from unique historical circumstances." *Id.* at 574.

The State's textual argument in this case bears no resemblance to the analogies proposed and rejected in *Gray* and *Reynolds*. The Equal Protection Clause's general language and Section 2's provision for population-based allotment of congressional seats were framed by the same body, at the same time, in the same unique historical circumstances. The Fourteenth Amendment's conspicuous failure to prescribe a method of state legislative apportionment therefore does not support plaintiffs' claim of invidious discrimination.

C. States Are Not Required to Reapportion Based on Total Population.

A State's decision to reapportion based on total population is generally not invidious discrimination for the reasons stated above. But if a State chooses to reapportion using reliable data on the citizen population or the voting-eligible population, that decision would not violate the Equal Protection Clause either. A State's good-faith effort to equalize

the number of citizens or voting-eligible citizens in state legislative districts also satisfies the one-person, one-vote principle.

The Ninth Circuit's contrary holding in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), is inconsistent with this Court's application of the Equal Protection Clause. In *Garza*, the Ninth Circuit reviewed the constitutionality of a court-drawn remedial plan entered after a judgment that the Los Angeles County Board of Supervisors intentionally discriminated against Hispanic voters, in violation of the Equal Protection Clause and the Voting Rights Act. *Id.* at 771. Although California law required the use of total population in redistricting, *id.* at 774, the county argued that the court-drawn plan's use of total population rather than voter population unconstitutionally overweighted the votes of citizens in a district with a higher proportion of non-citizens. *Id.* at 773.

The Ninth Circuit properly rejected the county's argument that the Equal Protection Clause required voter population to be used in apportioning. It noted that *Burns* "seems to permit states to consider the distribution of the voting population as well as that of the total population in constructing electoral districts," but it does not "*require* states to do so." *Id.* at 774 (citing *Burns*, 384 U.S. at 91–92). That observation about *Burns* was sufficient to resolve the claim and should have ended the analysis.

But *Garza* went further and erroneously pronounced that the Constitution *requires*

apportionment based on *total* population.[11] *Id.* at 774–76. In so holding, the Ninth Circuit contradicted *Burns*, which upheld an apportionment using registered voters as the population base. *See* 384 U.S. at 96–97.

The Ninth Circuit's incorrect determination reflects the same analytical flaw as plaintiffs' argument in this case. Instead of asking whether the government had engaged in invidious vote dilution under the Equal Protection Clause, *see supra* Part I, both plaintiffs and the Ninth Circuit focused on selected quotations from this Court's one-person, one-vote decisions. *See* Br. 19–29. The Ninth Circuit reached a different conclusion only because it favored different quotations than those selected by plaintiffs. For example, the Ninth Circuit relied primarily on the Court's statement in *Reynolds* that "the fundamental principle of representative government is one of equal

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[11] The Ninth Circuit apparently assumed that the Constitution must require States to use a particular apportionment base, *cf.* Br. 28–29, but the Constitution need not compel a single course of action, and it does not do so here. In *Wisconsin v. City of New York*, 517 U.S. 1, 23–24 (1996), for example, the Court held that the Secretary of Commerce's decision not to statistically adjust the initial census enumeration was a reasonable exercise of his authority, delegated by Congress, to conduct an "actual Enumeration" of the population. Echoing the Court's finding of "no constitutionally founded reason to interfere" in *Burns*, 384 U.S. at 92, the Court in *Wisconsin* found no constitutional basis "for preferring numerical accuracy to distributive accuracy, or for preferring gross accuracy to some particular measure of accuracy. The Constitution itself provides no real instruction on this point " 517 U.S. at 18.

representation for equal numbers of people." *Garza*, 918 F.2d at 774 (quoting *Reynolds*, 377 U.S. at 560–61). Noting that the framers required congressional seats to be apportioned based on total population, despite their awareness that total population "would include categories of persons who were ineligible to vote," the Ninth Circuit concluded that total population is an appropriate apportionment base. *Id.*

But *Garza* went on to determine that the Constitution required apportionment based on total population because equalizing voter population would cause "serious population inequalities across districts" and diminish non-voters' access to elected representatives. *Id.* It stressed that "[t]he purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'" *Id.* at 775 (quoting *Kirkpatrick*, 394 U.S. at 531). And it concluded that restricting "individuals' free access to elected representatives impermissibly burdens their right to petition the government." *Id.* (citing *Eastern R.R. President's Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961)). Because apportionment based on voter population would lead to a greater total population in districts with higher concentrations of non-voters, the Ninth Circuit concluded that it would "dilute the access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative." *Id.* In the majority's view, this would result in a denial of equal protection. *Id.* at 776.

Contrary to the view of the Ninth Circuit, plaintiffs are correct that non-voters would not have a cognizable one-person, one-vote (that is, invidious vote dilution) claim under the Equal Protection Clause or a valid First Amendment claim on this basis. *See* Br. 39–40. Non-voters cannot experience vote dilution because they cannot cast a vote that could possibly be diluted. Nor does the First Amendment's Petition Clause require that individuals have equal "access" to government, where "access" refers not to ability to petition but rather persuasiveness or effectiveness of petitioning. *See id.* Any rule requiring such equal "access" could halt government functions.

Dissenting in relevant part in *Garza*, Judge Kozinski correctly reasoned that the Ninth Circuit was wrong to interpret the Equal Protection Clause as requiring apportionment based on total population. *See* 918 F.2d at 784 (Kozinski, J., concurring in part and dissenting in part) (recognizing that "*Burns* would be inexplicable" if total population were required). But rather than allow governments to choose between total, citizen, or voting-eligible population, Judge Kozinski incorrectly interpreted the Equal Protection Clause to *require* governments to use *voting-eligible* population. *Id.* at 781–84. He cataloged this Court's statements in one-person, one-vote cases, and concluded that they offered "conflicting principles." *Id.* at 781. Judge Kozinski therefore explained "that reliance on verbal formulations is not enough; we must try to distill the

theory underlying the principle of one person one vote and, on the basis of that theory, select the philosophy embodied in the fourteenth amendment." *Id.* He then identified the apportionment principles of "electoral equality" and "equality of representation," and reasoned that "what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation." *Id.* at 782.

Judge Kozinski's ultimate conclusion does not square with this Court's recognition in *Burns* that the Equal Protection Clause does not compel governments to use a particular population base when apportioning. But he was right to acknowledge that "reliance on verbal formulations is not enough; we must try to distill the theory underlying the principle of one person one vote." *Id.* at 781. The underlying theory, however, is simply that the Equal Protection Clause prohibits invidious discrimination—here, invidious vote dilution. *See supra* Part I. Seen in this light, there is no tension between the Court's various statements acknowledging that the one-person, one-vote principle is concerned with vote dilution and its statements that States can reapportion using total population. Both are true, and this Court's cases confirm that a State generally does not commit invidious vote dilution when it equalizes total population in apportioning.

The Ninth Circuit's reasoning in *Garza* was therefore flawed. And *Burns* confirms that while the Equal Protection Clause requires States to use some population base in reapportioning, States generally do

not violate the Clause by selecting total, citizen, or voting-eligible population.

III. Texas Did Not Violate the Equal Protection Clause by Apportioning Senate Seats Based on Total Population.

Texas did not engage in invidious vote dilution when it substantially equalized total population among its Senate districts. Texas's decision to apportion Senate seats based on total population was wholly legitimate, especially given this Court's pronouncements that federal census data are reliable and the fact that the census currently does not record citizenship. Moreover, practical problems arise in trying to equalize both total and voter population when reapportioning, and plaintiffs' allegations do not suggest that Texas could do so here while maintaining compact and contiguous districts.

A. Texas Did Not Engage in Invidious Vote Dilution.

Plaintiffs have acknowledged at all stages of this litigation that the Texas Senate reapportionment (Plan S172) has a deviation from ideal of 8.04%, using total population. *See* Br. 46; Supp. J.S. App. 3 ("[T]he Plan's total population deviation from ideal was 8.04%."). Under *Brown*, "an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations" that is "insufficient to make out a prima facie case of invidious discrimination under the Fourteenth

Amendment so as to require justification by the State." 462 U.S. at 842.

Furthermore, plaintiffs have asserted that Texas did not even consider voting-eligible population in its apportionment. *See, e.g.*, J.S. App. 18a–19a ("Texas did not take into account the number of electors or potential electors in the proposed districts when crafting Plan S172."); Br. 45. Plaintiffs thus effectively concede that Texas did not intentionally dilute their votes. If there were evidence that the Legislature chose a particular population base for the purpose of diluting votes, then that could be enough to sustain an equal-protection claim of invidious vote dilution. Here, though, plaintiffs have not alleged any basis for a claim that Texas intended, through Plan S172, to dilute or underweight their votes. This case presents a clear "example of an apportionment plan the population variations of which are entirely the result of the consistent and nondiscriminatory application of a legitimate state policy." *Brown*, 462 U.S. at 844.

B. Census Data Provide a Reliable Measure of Population.

States have a legitimate interest in using reliable data to apportion state legislative districts, and Texas's choice to rely upon census data is a permissible one. While other data might also be permissibly used, the Court has already deemed federal census data reliable. The use of federal census data therefore does not show invidious discrimination,

and some metrics proposed by plaintiffs present more uncertainties.

The federal census enumeration provides the most reliable population data currently available. Census data are collected through an actual count (as opposed to a sampling) of the population, and reliable data are released down to very small units of geography (census blocks). The Court has described census data as "the best population data available." *Kirkpatrick*, 394 U.S. at 528; *see also Karcher*, 462 U.S. at 738 ("the census data provide the only reliable—albeit less than perfect—indication of the districts' 'real' relative population levels"). Although census data are not a perfect indication of real population levels, the Court has determined that the census count of population provides a degree of "certainty [that] is sufficient for decisionmaking." *Id.* at 737.

Plaintiffs suggest that Texas should have apportioned its Senate districts based on citizen-voting-age population ("CVAP"), Br. 45–49, but CVAP data are not provided by the census. While the census provides the most reliable enumeration of total population, it does not currently record citizenship and therefore does not provide a measurement of CVAP. The 2010 census consisted solely of a "short form questionnaire" that collects basic demographic

information about place of residence, age, gender, race, and household relationships.[12]

The Census Bureau currently provides estimates of citizenship data based on the American Community Survey ("ACS"). Unlike the census, the ACS is not an enumeration. ACS data represent a continuous survey of approximately two million final interviews per year (out of approximately three million addresses sampled).[13] The resulting data are provided with margins of error representing a 90% confidence level.[14] The Census Bureau has described the differences between the ACS data and the decennial census as follows: "While the main function of the decennial census is to provide *counts* of people for the purpose of congressional apportionment and legislative redistricting, the primary purpose of the ACS is to measure the changing social and economic *characteristics* of the U.S. population."[15] As areas

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[12] *See* U.S. Census Bureau, United States Census 2010 (2009), http://www.census.gov/2010census/partners/pdf/factSheet_General.pdf.

[13] *See* ACS, U.S. Census Bureau, A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know 3 (Oct. 2008), https://www.census.gov/content/dam/Census/library/publications/2008/acs/ACSGeneralHandbook.pdf [hereinafter ACS Handbook]; *see also* ACS, U.S. Census Bureau, Sample Size, https://www.census.gov/acs/www/methodology/sample-size-and-data-quality/sample-size/ (providing annual sample size data) (last visited Sept. 15, 2015).

[14] *See* ACS Handbook at 10.

[15] *Id.* at 4.

decrease in size, more statistical error is introduced due to the small sample sizes available; this in turn leads to a larger margin of error in smaller districts.[16]

Registered-voter data—the other metric urged by plaintiffs, Br. 9—present additional reliability concerns that States may legitimately prefer to avoid. Voter-registration levels vary from year to year based on factors beyond the States' control. Among other considerations, it is not clear whether it would be appropriate to favor presidential election years, due to higher levels of registration in those years, or whether redistricting would need to take place more frequently to avoid locking in for ten years the results of actual voter turnout on a given election day. The Court recognized these concerns in *Burns*. *See* 384 U.S. at 96–97.

This is not to say that the Constitution would forbid the States to rely on ACS data or that it requires them to use total census population as an apportionment base. The mere use of ACS data would not give rise to an inference of invidious vote dilution, and a State could reasonably decide to equalize the CVAP population in its legislative districts and deem the existing ACS data from the Census Bureau sufficiently reliable. Or a State might conduct its own

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[16] *See id.* at A-11 (explaining that the "relationship between sample size and [sampling error] is the reason ACS estimates for less populous areas are only published using multiple years of data: to take advantage of the larger sample size that results from aggregating data from more than one year.").

enumeration to develop more robust data on citizenship and voting-age citizenship for use in redistricting.[17] As long as the State's choice is not irrational or made for an impermissible purpose, and as long as it makes a good-faith effort to achieve substantial equality in the chosen population, it has not invidiously diluted any person's vote.

A State therefore does not act arbitrarily or irrationally if it prefers to rely on the federal census. And as long as it does not rely on total population for the purpose of diluting voting strength, it does not violate the Equal Protection Clause.

C. Plaintiffs Propose Unworkable Apportionment Methods.

Plaintiffs' proposed standards for apportionment would be unworkable, and they would mire the Judiciary in the most minute details of the apportionment process. *Cf., e.g., Gaffney*, 412 U.S. at 749–50 ("That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.").

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[17] *See, e.g., Baker*, 369 U.S. at 188, 191 (noting that while the Tennessee Constitution required a state enumeration, the State had "abandoned separate enumeration in favor of reliance upon the Federal Census").

The variety of voter-population metrics discussed in plaintiffs' brief demonstrates the practical difficulties that would arise if the Court were to require voter population to be used in apportioning state legislative districts. *See* J.S. App. 26a. Plaintiffs group together all of the various metrics—CVAP, total voter registration, and non-suspense voter registration—as equalizing voters. J.S. App. 27a, 30a. But each of these metrics represents a different population, *see* Br. 9 nn.2, 3, and this Court would have to determine whether one or all of these would be constitutionally acceptable. According to plaintiffs' complaint, the variation among just these "voter equalization" approaches presents a range of nearly a 10% deviation: from 45.95% (using the 5-year CVAP estimate from the 2007–2011 ACS survey) to 55.06% (using total voter registration from 2010). *See* Br. 9. That deviation is significant given that the Court has looked to a 10% deviation to determine whether a prima facie case of invidious vote dilution has been established. *See, e.g.*, *Brown*, 462 U.S. at 842–43.

To the extent plaintiffs argue that Texas must equalize both total and voter population, Br. 46, they have not plausibly alleged that Texas could do so while still maintaining reasonably compact and contiguous Senate districts. Plaintiffs offer only conclusory allegations from their retained expert:

> Using standard available GIS software, one can readily adjust the boundaries of the districts in Plan S172 to create numerous alternatives to Plan S172. I observed that it is

> possible to devise a number of feasible alternative 31-district plans with different combinations of total population deviations and CVAP deviations. I was not asked to, and did not attempt to, devise a plan that would optimally balance these two deviations.

Supp. J.S. App. 2. Plaintiffs' expert does not specify the extent of deviation he achieved in attempting to balance CVAP and total-population equality. Instead, he offers vague assurances about "minimizing total population and CVAP deviations," eliminating "gross deviations," avoiding "significantly larger deviations in total population," and "substantially equaliz[ing]" the distribution of CVAP. Supp. J.S. App. 3. Plaintiffs thus fail to explain how, or to what extent, Texas could simultaneously achieve substantial equality in total and voting-eligible population, let alone how that objective would affect other traditional redistricting principles such as compactness, contiguity, and preservation of political subdivisions. *See, e.g.*, *Reynolds*, 377 U.S. at 578; *Brown*, 462 U.S. at 842.

Plaintiffs presented no potential redistricting map to the district court, and they do not allege that they (or anyone else) submitted a map reflecting their preferred apportionment method to the Legislature. If a plan can violate the Equal Protection Clause by having greater than a 10% variance in total population, but also violate equal protection by having greater than a 10% variance in actual voters, there will almost certainly be situations where these two are irreconcilable. This problem of balancing would be

further compounded for the Texas House of Representatives, where the State is divided into 150 much smaller districts. *See* Tex. Const. art. III, § 2.

Furthermore, plaintiffs agree that States can legitimately consider the number of inhabitants in a district when reapportioning. J.S. App. 31a; Br. 41. Census population has the benefit of not only being a reliable metric for equalizing population across districts, but also indicating a rough demand for government services. Use of census data can allow States to reapportion by furthering the legitimate goal of ensuring that elected officials are not tasked with representing a substantially greater number of constituents than other officials. Plaintiffs are correct that non-voters do not have cognizable equal protection or First Amendment claims in this context. Br. 39–40. But while the Constitution does not require the State to give priority to these particular interests, they are legitimate goals that can also be weighed in choosing an apportionment method.

In sum, Texas did not engage in invidious discrimination when it chose—like countless other jurisdictions across the country—to reapportion by equalizing total population. Texas therefore did not violate the Equal Protection Clause.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

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APPORTIONMENT BASE PROVIDED BY STATE CONSTITUTIONS AND STATUTES

Ala. The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken.

Ala. Const. art. IX, § 198.

It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided,

that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts.

Ala. Const. art. IX, § 200.

Alaska The Redistricting Board shall reapportion the house of representatives and the senate immediately following the official reporting of each decennial census of the United States. Reapportionment shall be based upon the population within each house and senate district as reported by the official decennial census of the United States.

Alaska Const. art. VI, § 3.

The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article . . . . Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts.

Alaska Const. art. VI, § 6.

Ariz. The independent redistricting commission shall establish congressional and legislative districts. The commencement

of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below . . . state legislative districts shall have equal population to the extent practicable . .

Ariz. Const. art. IV, pt. 2 § 1(14).

Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals.

Ariz. Const. art. IV, pt. 2 § 1(15).

For purposes of adopting legislative and congressional district boundaries, the legislature or any entity that is charged with recommending or adopting legislative or congressional district boundaries shall make its recommendations or determinations using population data from the United States bureau of the census identical to those from the actual enumeration conducted by the bureau for the apportionment of the representatives of the United States house of representatives in the United States decennial census and

shall not use census bureau population counts derived from any other means, including the use of statistical sampling, to add or subtract population by inference.

Ariz. Rev. Stat. Ann. § 16-1103.

Ark. The House of Representatives shall consist of one hundred members and each county existing at the time of any apportionment shall have at least one representative; the remaining members shall be equally distributed (as nearly as practicable) among the more populous counties of the State, in accordance with a ratio to be determined by the population of said counties as shown by the Federal census next preceding any apportionment hereunder.

Ark. Const. art. VIII, § 2.

"The Board of Apportionment" hereby created shall, from time to time, divide the state into convenient senatorial districts in such manner as that the Senate shall be based upon the inhabitants of the state, each senator representing, as nearly as practicable, an equal number thereof; each district shall have at least one senator.

Ark. Const. art. VIII, § 3.

Cal. In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Citizens Redistricting Commission described in Section 2 shall adjust the boundary lines of the congressional, State Senatorial, Assembly, and Board of Equalization districts (also known as "redistricting") in conformance with the standards and process set forth in Section 2.

Cal. Const. art. XXI, § 1.

Districts shall comply with the United States Constitution. Congressional districts shall achieve population equality as nearly as is practicable, and Senatorial, Assembly, and State Board of Equalization districts shall have reasonably equal population with other districts for the same office, except where deviation is required to comply with the federal Voting Rights Act or allowable by law.

Cal. Const. art. XXI, § 2(d)(1).

[T]he Legislature hereby requests the Citizens Redistricting Commission to deem each incarcerated person as residing at his or her last known place of residence, rather than at the institution of his or her incarceration, and to utilize

> the information furnished to it pursuant to subdivision (a) in carrying out its redistricting responsibilities under Article XXI of the California Constitution. The Legislature also requests the commission to . . . (2) Deem an inmate in state custody in a facility within California for whom the last known place of residence is either outside California or cannot be determined, or an inmate in federal custody in a facility within California, to reside at an unknown geographical location in the state and exclude the inmate from the population count for any district, ward, or precinct.
>
> Cal. Elec. Code § 21003.

Colo. The state shall be divided into as many senatorial and representative districts as there are members of the senate and house of representatives respectively, each district in each house having a population as nearly equal as may be, as required by the constitution of the United States, but in no event shall there be more than five percent deviation between the most populous and the least populous district in each house.

Colo. Const. art. V, § 46.

> After each federal census of the United States, the senatorial districts and representative districts shall be established, revised, or altered, and the members of the senate and the house of representatives apportioned among them, by a Colorado reapportionment commission

Colo. Const. art. V, § 48(1)(a).

Conn. The establishment of congressional districts and of districts in the general assembly shall be consistent with federal constitutional standards.

Conn. Const. art. III, § 5.

> The assembly and senatorial districts and congressional districts as now established by law shall continue until the regular session of the general assembly next after the completion of the taking of the next census of the United States. On or before the fifteenth day of February next following the year in which the decennial census of the United States is taken, the general assembly shall appoint a reapportionment committee consisting of four members of the senate . . . .

Conn. Const. art. III, § 6.

Del. Each existing Representative District as set forth in Section 2 of this Article, with a population residing therein in excess of 15,000, as shown by the last official federal decennial census shall be entitled to one additional Representative for each additional 15,000 population or major fraction thereof residing within the District. Upon any Representative District, as set forth in Section 2 of this Article, being entitled to more than one Representative, it shall be subdivided into new Representative Districts. . . . Each new Representative District shall, insofar as is possible, be formed of contiguous territory; shall be as nearly equal in population as possible to the other new districts being created . . . .

Del. Const. art. II, § 2A.

In determining the boundaries of the several representative and senatorial districts within the State, the General Assembly shall use the following criteria. Each district shall, insofar as is possible . . . [b]e nearly equal in population . . . .

Del. Code Ann. tit. 29, § 804.

The apportionment provided for by this chapter shall continue in effect until the official reporting by the President of the

United States of the next federal decennial census.

Del. Code Ann. tit. 29, § 805.

The General Assembly, in determining the reapportionment and redistricting for the State, applying the criteria set forth in § 804 of this title, and using the official reporting of the federal decennial census as set forth in § 805 of this title, shall not count as part of the population in a given district boundary any incarcerated individual who: (1) Was incarcerated in a state or federal correctional facility, as determined by the decennial census; and (2) Was not a resident of the State before the person's incarceration.

Del. Code Ann. tit. 29, § 804A.

Fla. Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

Fla. Const. art. III, § 21(b).

Each decennial census of the state taken by the United States shall be an official census of the state.

Fla. Const. art. X, § 8(a).

Each decennial census, for the purpose of classifications based upon population, shall become effective on the thirtieth day after the final adjournment of the regular session of the legislature convened next after certification of the census.

Fla. Const. art. X, § 8(b).

Ga. Such districts shall be composed of contiguous territory. The apportionment of the Senate and of the House of Representatives shall be changed by the General Assembly as necessary after each United States decennial census.

Ga. Const. art. III, § 2, para. II.

Haw. The commission shall allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units, namely: (1) the island of Hawaii, (2) the islands of Maui, Lanai, Molokai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau,

using the total number of permanent residents in each of the basic island units and computed by the method known as the method of equal proportions . . . .

Haw. Const. art. IV, § 4.

Upon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of permanent residents per member in each district is as nearly equal to the average for the basic island unit as practicable.

Haw. Const. art. IV, § 6.

Idaho

The members of the legislature following the decennial census of 1990 and each legislature thereafter shall be apportioned to not less than thirty nor more than thirty-five legislative districts of the state as may be provided by law.

Idaho Const. art. III, § 4.

Congressional and legislative redistricting plans considered by the commission, and plans adopted by the commission,

shall be governed by the following criteria: (1) The total state population as reported by the U.S. census bureau, and the population of subunits determined therefrom, shall be exclusive permissible data. . . .

Idaho Code Ann. § 72-1506.

Ill. Legislative Districts shall be compact, contiguous and substantially equal in population.

Ill. Const. art. IV, § 3(a).

In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative Districts and the Representative Districts.

Ill. Const. art. IV, § 3(b).

Each Legislative District shall be divided into two Representative Districts.

Ill. Const. art. IV, § 2(b).

Ind. The General Assembly elected during the year in which a federal decennial census is taken shall fix by law the number of Senators and Representatives and apportion them among districts according to

the number of inhabitants in each district, as revealed by that federal decennial census.

Ind. Const. art. IV, § 5.

Iowa The state shall be apportioned into senatorial and representative districts on the basis of population.

Iowa Const. art. III, § 34.

Senatorial and representative districts, respectively, shall each have a population as nearly equal as practicable to the ideal population for such districts, determined by dividing the number of districts to be established into the population of the state reported in the federal decennial census. Senatorial districts and representative districts shall not vary in population from the respective ideal district populations except as necessary to comply with one of the other standards enumerated in this section. In no case shall the quotient, obtained by dividing the total of the absolute values of the deviations of all district populations from the applicable ideal district population by the number of districts established, exceed one percent of the applicable ideal district population.

Iowa Code § 42.4(1)(a).

> The general assembly may provide by law for factors in addition to population, not in conflict with the Constitution of the United States, which may be considered in the apportioning of senatorial districts. No law so adopted shall permit the establishment of senatorial districts whereby a majority of the members of the senate shall represent less than forty percent of the population of the state as shown by the most recent United States decennial census.
>
> Iowa Const. art. III, § 34.

Kan. [T]he legislature shall by law reapportion the state senatorial districts and representative districts on the basis of the population of the state as established by the most recent census of population taken and published by the United States bureau of the census. Senatorial and representative districts shall be reapportioned upon the basis of the population of the state adjusted: (1) To exclude nonresident military personnel stationed within the state and nonresident students attending colleges and universities within the state; and (2) to include military personnel stationed within the state who are residents of the state and students attending colleges and universities within

the state who are residents of the state in the district of their permanent residence.

Kan. Const. art. X, §1(a).

The number of representatives and senators shall be regulated by law, but shall not exceed one hundred twenty-five representatives and forty senators. Representatives and senators shall be elected from single-member districts prescribed by law.

Kan. Const. art. II, § 2.

Ky. The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district, which districts shall constitute the Senatorial and Representative Districts for ten years. Not more than two counties shall be joined together to form a Representative District: Provided, In doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. . . . If, in making said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be

given to districts having the largest territory. No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous.

Ky. Const. § 33.

La. By the end of the year following the year in which the population of this state is reported to the president of the United States for each decennial federal census, the legislature shall reapportion the representation in each house as equally as practicable on the basis of population shown by the census.

La. Const. art. III, § 6(A).

Me. The number of Representatives shall be divided into the number of inhabitants of the State exclusive of foreigners not naturalized according to the latest Federal Decennial Census or a State Census previously ordered by the Legislature to coincide with the Federal Decennial Census, to determine a mean population figure for each Representative District.

Me. Const. art. IV, pt. 1, § 2.

The Legislature which shall convene in the year 2013, and also the Legislature

which shall convene in the year 2021 and every tenth year thereafter, shall cause the State to be divided into districts for the choice of a Senator from each district, using the same method as provided in Article IV, Part First, Section 2 for apportionment of Representative Districts.

Me. Const. art. IV, pt. 2, § 2.

Md. Each legislative district shall contain one (1) Senator and three (3) Delegates.

Md. Const. art. III, § 3.

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population.

Md. Const. art. III § 4.

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing of the members of the Senate and the House of Delegates.

Md. Const. art. III, § 5.

The population count used after each decennial census for the purpose of creating the legislative districting plan for the General Assembly: (1) may not

include individuals who: (i) were incarcerated in State or federal correctional facilities, as determined by the decennial census; and (ii) were not residents of the State before their incarceration; and (2) shall count individuals incarcerated in the State or federal correctional facilities, as determined by the decennial census, at their last known residence before incarceration if the individuals were residents of the State.

Md. Code Ann., State Gov't § 2-2A-01.

Mass. The General Court shall, at its first regular session after the year in which said census was taken, divide the Commonwealth into one hundred and sixty representative districts of contiguous territory so that each representative will represent an equal number of inhabitants, as nearly as may be . . . .

Mass. Const. amend. art. CI § 1.

The General Court shall, at its first regular session after the year in which said census is taken, divide the Commonwealth into forty districts of contiguous territory, each district to contain, as nearly as may be, an equal

number of inhabitants according to said census . . .

Mass. Const. amend. art. CI § 2.

Mich. The house of representatives shall consist of 110 members elected for two-year terms from single member districts apportioned on a basis of population as provided in this article.

Mich. Const. art. IV, § 3.

Senate and house of representatives districts shall have a population not exceeding 105% and not less than 95% of the ideal district size for the senate or the house of representatives unless and until the United States supreme court establishes a different range of allowable population divergence for state legislative districts.

Mich. Comp. Laws § 4.261(1)(d).

In districting the state for the purpose of electing senators after the official publication of the total population count of each federal decennial census, each county shall be assigned apportionment factors equal to the sum of its percentage of the state's population as shown by the last regular federal decennial census computed to the nearest one-one hundredth of

one percent multiplied by four and its percentage of the state's land area computed to the nearest one-one hundredth of one percent.

Mich. Const. art. IV, § 2.

Minn. The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof.

Minn. Const. art. IV, § 2.

At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts. Senators shall be chosen by single districts of convenient contiguous territory. No representative district shall be divided in the formation of a senate district.

Minn. Const. art. IV § 3.

Miss. The committee shall divide the number of members of the house of representatives that it recommends within constitutional limitations into the total population of the state as reported in each census to determine the number of persons which

constitutes the norm to be represented by a representative.

Miss. Code § 5-3-99(2).

The committee shall divide the number of members of the senate that it recommends within constitutional limitations into the total population of the state as reported in each census to determine the number of persons which constitutes the norm to be represented by a senator.

Miss. Code § 5-3-99(1).

Mo. The commission shall reapportion the representatives by dividing the population of the state by the number one hundred sixty-three and shall establish each district so that the population of that district shall, as nearly as possible, equal that figure.

Mo. Const. art. III, § 2.

The commission shall reapportion the senatorial districts by dividing the population of the state by the number thirty-four and shall establish each district so that the population of that district shall, as nearly as possible, equal that figure.

Mo. Const. art. III, § 7.

The last decennial census of the United States shall be used in apportioning representatives and determining the population of senatorial and representative districts. Such districts may be altered from time to time as public convenience may require.

Mo. Const. art. III, § 10.

Mont. The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.

Mont. Const. art. V, § 14(1).

Within 90 days after the official final decennial census figures are available, the commission shall file its final plan for congressional districts with the secretary of state and it shall become law.

Mont. Const. art. V, § 14(2).

Neb. The Legislature shall by law determine the number of members to be elected and divide the state into legislative districts. In the creation of such districts, any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct legislative districts, as nearly equal in population as may be and composed of contiguous and compact territory. One member of the Legislature shall be elected from each such district. The basis of apportionment shall be the population excluding aliens, as shown by the next preceding federal census.

Neb. Const. art. III, § 5.

The State of Nebraska is hereby divided into forty-nine legislative districts. Each district shall be entitled to one member in the Legislature.

Neb. Rev. Stat. § 50-1153.

Nev. It shall be the mandatory duty of the legislature at its first session after the taking of the decennial census of the United States in the year 1950, and after each subsequent decennial census, to fix by law the number of senators and assemblymen, and apportion them among the several counties of the State, or

among legislative districts which may be established by law, according to the number of inhabitants in them, respectively.

Nev. Const. art. IV, § 5.

The enumeration of the inhabitants of this State shall be taken under the direction of the Legislature if deemed necessary in AD Eighteen hundred and Sixty five, AD Eighteen hundred and Sixty seven, AD Eighteen hundred and Seventy five, and every ten years thereafter; and these enumerations, together with the census that may be taken under the direction of the Congress of the United States in A.D. Eighteen hundred and Seventy, and every subsequent ten years shall serve as the basis of representation in both houses of the Legislature.

Nev. Const. art. XV, § 13.

N.H. As soon as possible after the convening of the next regular session of the legislature, and at the session in 1971, and every ten years thereafter, the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the

state taken by authority of the United States or of this state.

N.H. Const. pt. 2, art. 9.

The general court shall have the power to provide by statute for making suitable adjustments to the general census of the inhabitants of the state taken by the authority of the United States or of this state on account of non-residents temporarily residing in this state.

N.H. Const. pt. 2, art. 9-a.

When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats the town or ward shall have its own district of one or more representative seats.

N.H. Const. pt. 2, art. 11.

And that the state may be equally represented in the senate, the legislature shall divide the state into single-member districts, as nearly equal as may be in population, each consisting of contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place. The legislature shall form the single-member

districts at its next session after approval of this article by the voters of the state and thereafter at the regular session following each decennial federal census.

N.H. Const. pt. 2, art. 26.

N.J. The Assembly districts shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible, and in no event shall each such district contain less than eighty per cent nor more than one hundred twenty per cent of one-fortieth of the total number of inhabitants of the State as reported in the last preceding decennial census of the United States.

N.J. Const. art. IV, § 2, para. 3.

The Senate shall be composed of forty senators apportioned among Senate districts as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States and according to the method of equal proportions. Each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties.

N.J. Const. art. IV, § 2, para. 1.

N.M. Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion its membership.

N.M. Const. art. IV, § 3, para. D.

The house of representatives is composed of seventy members to be elected from districts that are contiguous and that are as compact as is practical and possible.

N.M. Stat. Ann. § 2-7c-3.

The senate is composed of forty-two members to be elected from districts that are contiguous and that are as compact as is practical.

N.M. Stat. Ann. § 2-8d-2.

N.Y. Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation

thereof purport to give the information necessary therefor.

N.Y. Const. art. III, § 4(a).

To the extent practicable, districts shall contain as nearly as may be an equal number of inhabitants. For each district that deviates from this requirement, the commission shall provide a specific public explanation as to why such deviation exists.

N.Y. Const. art. III, § 4(c)(2).

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment.

N.Y. Const. art. III, § 5.

For the purpose of apportioning senate and assembly districts pursuant to the foregoing provisions of this article, the term "inhabitants, excluding aliens" shall mean the whole number of persons.

N.Y. Const. art. III, § 5-a.

The assembly shall consist of one hundred fifty members chosen from the districts described within and apportioned among the counties on the basis of the number of

inhabitants of the state based on the Federal Census of two thousand ten . .

N.Y. State Law § 120.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty.

N.Y. Const. art. III, § 4(d).

The senate shall consist of sixty-three members chosen from the districts described within and apportioned among the counties on the basis of the number of inhabitants of the state based on the Federal Census of two thousand ten, as adjusted pursuant to the provisions of part XX of chapter fifty-seven of the laws of two thousand ten.

N.Y. State Law § 123.

Until such time as the United States bureau of the census shall implement a policy of reporting each such incarcerated person at such person's residential address prior to incarceration, the task force shall use such data to develop a database in which all incarcerated persons shall be, where possible, allocated for redistricting purposes, such that each

geographic unit reflects incarcerated populations at their respective residential addresses prior to incarceration rather than at the addresses of such correctional facilities. For all incarcerated persons whose residential address prior to incarceration was outside of the state, or for whom the task force cannot identify their prior residential address, and for all persons confined in a federal correctional facility on census day, the task force shall consider those persons to have been counted at an address unknown and persons at such unknown address shall not be included in such data set created pursuant to this paragraph.

N.Y. Elec. Law § 83-m.

N.C. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the representative districts and the apportionment of Representatives among those districts, subject to the following requirements: (1) Each Representative shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Representative represents being determined for this purpose by dividing the population of the district that he represents by the number

of Representatives apportioned to that district. . . .

N.C. Const. art. II, § 5.

The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts, subject to the following requirements: (1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district. . . .

N.C. Const. art. II, § 3.

N.D. The legislative assembly shall guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates.

N.D. Const. art. 4, § 2.

A legislative redistricting plan based on any census taken after 1999 must meet the following requirements: . . . 5.

Legislative districts must be as nearly equal in population as is practicable. Population deviation from district to district must be kept at a minimum.

N.D. Cent. Code § 54-03-01.5.

Ohio

The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment.

Ohio Const. art. XI, § 2.

The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid

dividing a county in accordance with section 9 of this Article.

Ohio Const. art. XI, § 3.

The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment.

Ohio Const. art. XI, § 2.

The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article.

Ohio Const. art. XI, § 4.

Senate districts shall be composed of three contiguous House of Representatives districts.

Ohio Const. art. XI, § 11.

Okla. The number of members of the House of Representatives to which each county shall be entitled shall be determined according to the following formula: a. The total population of the state as ascertained by the most recent Federal Decennial Census shall be divided by the number one hundred and the quotient shall be the ratio of representation in the House of Representatives, except as otherwise provided in this Article. . . .

Okla Const. art. V, §10A.

The state shall be apportioned into forty-eight senatorial districts in the following manner: the nineteen most populous counties, as determined by the most recent Federal Decennial Census, shall constitute nineteen senatorial districts with one senator to be nominated and elected from each district; the fifty-eight less populous counties shall be joined into twenty-nine two-county districts with one senator to be nominated and elected from each of the two-county districts. In apportioning the State Senate,

consideration shall be given to population, compactness, area, political units, historical precedents, economic and political interests, contiguous territory, and other major factors, to the extent feasible.

Okla. Const. art. V, §9A.

Or. At the odd-numbered year regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government, the number of Senators and Representatives shall be fixed by law and apportioned among legislative districts according to population. A senatorial district shall consist of two representative districts. . . . The ratio of Senators and Representatives, respectively, to population shall be determined by dividing the total population of the state by the number of Senators and by the number of Representatives.

Or. Const. art. IV, § 6.

The Legislative Assembly or the Secretary of State, whichever is applicable, shall consider the following criteria when apportioning the state into congressional and legislative districts: (1)

Each district, as nearly as practicable, shall. . . (b) Be of equal population.

Or. Rev. Stat. § 188.010.

Pa. The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. In each year following the year of the Federal decennial census, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Commonwealth.

Pa. Const. art. II, § 17(a).

No later than ninety days after either the commission has been duly certified or the population data for the Commonwealth as determined by the Federal decennial census are available, whichever is later in time, the commission shall file a preliminary reapportionment plan with such elections officer.

Pa. Const. art. II, § 17(c).

The publication shall also state the population of the senatorial and representative districts having the smallest

and largest population and the percentage variation of such districts from the average population for senatorial and representative districts.

Pa. Const. art. II, § 17(i).

R.I. The house of representatives shall be constituted on the basis of population and the representative districts shall be as nearly equal in population and as compact in territory as possible. The general assembly shall, after any new census taken by authority of the United States, reapportion the representation to conform to the Constitution of the state and the Constitution of the United States.

R.I. Const. art. VII, § 1.

[I]n no case shall a single state representative district have a population which varies by more than five percent (5%) from the average population of all representative districts as determined by the population reported in the federal census in 2010 . . .

2011 R.I. Pub. Laws ch. 106 § 2(c)(2).

The senate shall be constituted on the basis of population and the senatorial districts shall be as nearly equal in

> population and as compact in territory as possible. The general assembly shall, after any new census taken by authority of the United States, reapportion the representation to conform to the Constitution of the state and the Constitution of the United States.
>
> R.I. Const. art. VIII, § 1.
>
> In no case shall a single state senate district have a population which varies by more than five percent (5%) from the average population of all senate districts as determined by the population reported in the federal census in 2010 . . . .
>
> 2011 R.I. Pub. Laws ch. 106 § 2(c)(2).

S.C. The House of Representatives shall consist of one hundred and twenty-four members, to be apportioned among the several Counties according to the number of inhabitants contained in each.

S.C. Const. art. III, § 3.

In assigning Representatives to the several Counties, the General Assembly shall allow one Representative to every one hundred and twenty-fourth part of

the whole number of inhabitants in the State. . .

S.C. Const. art. III, § 4.

The Senate shall be composed of one member from each County, to be elected for the term of four years by the qualified electors in each County, in the same manner in which members of the House of Representatives are chosen.

S.C. Const. art. III, § 6.

S.D. The Legislature shall apportion its membership by dividing the state into as many single-member, legislative districts as there are state senators. House districts shall be established wholly within senatorial districts and shall be either single-member or dual-member districts as the Legislature shall determine. Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census.

S.D. Const. art. III, § 5.

Tenn. The apportionment of Senators and Representatives shall be substantially according to population. After each

decennial census made by the Bureau of Census of the United States is available the General Assembly shall establish senatorial and representative districts.

Tenn. Const. art. II, § 4.

It is the intention of the general assembly that . (2) Districts must be substantially equal in population in accordance with constitutional requirements for "one (1) person one (1) vote" as judicially interpreted to apply to state legislative districts; . . . (3) Geographic areas, boundaries and population counts used for redistricting shall be based on the 2010 federal decennial census."

Tenn. Code Ann. § 3-1-103(b).

The number of senators shall be apportioned by the General Assembly among the several counties or districts substantially according to population, and shall not exceed one-third the number of Representatives.

Tenn. Const. art. II, § 6.

Tex. The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

Tex. Const. art. III, § 26.

The State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator.

Tex. Const. art. III, § 25.

Utah

The Legislature adopts the official census population figures and maps of the Bureau of the Census of the United States Department of Commerce developed in connection with the taking of the 2010 national decennial census as the official data for establishing House district boundaries.

Utah Code Ann. § 36-1-201.5(3).

The Legislature adopts the official census population figures and maps of the Bureau of the Census of the United States Department of Commerce developed in connection with the taking of the 2010 national decennial census as the official data for establishing Senate district boundaries.

Utah Code Ann. § 36-1-101.5(3).

Vt.

In establishing representative districts, which shall afford equality of representation, the General Assembly shall seek to maintain geographical compactness and contiguity and to adhere to boundaries of counties and other existing political subdivisions.

Vt. Const. ch. II, § 13.

The house of representatives and the senate shall be reapportioned and

redistricted on the basis of population during the biennial session after the taking of each decennial census of the United States, or after a census taken for the purpose of such reapportionment under the authority of this state.

Vt. Stat. Ann. tit. 17, § 1903(a).

The standard for creating districts for the election of representatives to the general assembly shall be to form representative districts with minimum percentages of deviation from the apportionment standard for the house of representatives.

Vt. Stat. Ann. tit. 17, § 1903(b).

In establishing senatorial districts, which shall afford equality of representation, the General Assembly shall seek to maintain geographical compactness and contiguity and to adhere to boundaries of counties and other existing political subdivisions.

Vt. Const. ch. II, § 18.

Va. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the

district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every ten years thereafter.

Va. Const. art. II, § 6.

Wash. Each district shall contain a population, excluding nonresident military personnel, as nearly equal as practicable to the population of any other district.

Wash. Const. art. II, § 43(5).

W. Va. After every census the delegates shall be apportioned as follows: The ratio of representation for the House of Delegates shall be ascertained by dividing the whole population of the state by the number of which the House is to consist and rejecting the fraction of a unit, if any, resulting from such division. Dividing the population of every delegate district, and of every county not included in a delegate district, by the ratio thus ascertained, there shall be assigned to each a number of delegates equal to the quotient obtained by this division, excluding the fractional remainder.

W. Va. Const. art. VI, § 7.

[Senate] districts shall be compact, formed of contiguous territory, bounded by county lines, and, as nearly as practicable, equal in population, to be ascertained by the census of the United States.

W. Va. Const. art. VI, § 4.

Wis. At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants.

Wis. Const. art. IV, § 3.

This state is divided into 33 senate districts, each composed of 3 assembly districts.

Wis. Stat. § 4.001.

Wyo. Each county shall constitute a senatorial and representative district; the senate and house of representatives shall be composed of members elected by the legal voters of the counties respectively, every two (2) years. They shall be apportioned among the said counties as nearly as may

be according to the number of their inhabitants.

Wyo. Const. art. III, § 3.